

ESTTA Tracking number: **ESTTA549641**

Filing date: **07/22/2013**

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	92054629
Party	Defendant Wohali Outdoors, LLC
Correspondence Address	S MAX HARRIS DOYLE HARRIS DAVIS HAUGHEY 1350 SOUTH BOULDER, SUITE 700 TULSA, OK 74119 UNITED STATES max.harris@1926blaw.com
Submission	Other Motions/Papers
Filer's Name	S. Max Harris
Filer's e-mail	max.harris@1926blaw.com, lesley@1926blaw.com
Signature	/s/ S. Max Harris
Date	07/22/2013
Attachments	07-22-13 - Wohali's Emergency Mot to Clarify Order.pdf(28079 bytes) Ex 1 to Emergency Motion.pdf(66307 bytes) Ex 2 to Emergency Motion.pdf(118510 bytes) Ex 3 to Emergency Motion.pdf(132904 bytes)

**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**

)	
In re Registration No. 3,904,929)	
)	
SHELTERED WINGS, INC.)	Cancellation No. 92054629
)	
Petitioner/Plaintiff,)	
)	
v.)	
)	
WOHALI OUTDOORS, LLC)	
)	
Respondent/Defendant.)	
)	

**WOHALI OUTDOORS, LLC’S EMERGENCY MOTION: (1) FOR COURT
TO CLARIFY MAY 29, 2013 ORDER; (2) RESET
TRIAL TESTIMONY PERIODS; AND (3) RULE ON THIS
MOTION ON AN EXPEDITED BASIS AND BRIEF IN SUPPORT**

Respondent/Defendant, Wohali Outdoors, LLC (“Wohali”), respectfully moves the Court to: (1) clarify the Court’s May 29, 2013 Order (Ex. 1); (2) reset trial testimony periods, beginning with Wings’ 30 day trial period; and (3) rule on this motion on an expedited basis.

In support, Wohali submits the following.

I. STATEMENT OF FACTS

1. On May 3, 2013, Petitioner (Wings) issued its Pretrial Disclosures.
2. On May 17, 2013 Wohali filed Wohali Outdoors, LLC’s Objections to Sheltered Wings, Inc.’s Pretrial Disclosures (“Wohali’s Motion”).
3. Also on May 17, 2013, Wings filed a Stipulated Motion to Extend Trial Testimony Periods.
4. On May 29, 2013, the Court entered an Order which stated (among other things):

“Petitioner’s consented motion (filed May 17, 2013) to extend testimony periods is granted. Trademark Rule 2.127(a).

Testimony periods are reset in accordance with petitioner’s consented motion.”

(Ex. 1 - May 29, 2013 Order at p. 1.)

“As a final matter, the Board notes that on May 17, 2013, respondent filed objections to petitioner’s pretrial disclosures.

.....
The Board construes respondent’s May 17, 2013 objections as a motion to limit the scope of testimony taken by petitioner during petitioner’s assigned testimony period. The Board is construing respondent’s objections as such in order to resolve any disputes regarding the testimony to be provided by **Mr. Lizdas** prior to the opening of petitioner’s testimony period, as reset by this order.

Accordingly, **proceedings herein are now suspended pending the disposition of respondent’s construed motion to limit the testimony of Mr. Lizdas.**”

(Ex. 1 at p. 2) (emphasis added).

5. Wohali understands the Court’s order to mean that all proceedings (including trial testimony depositions) are suspended to allow the Court to rule on “Wohali’s Motion” before Wings’ trial testimony period begins. Despite this Order (suspending all proceedings), on June 27, 2013, Wings issued a notice setting Mr. Lizdas’ deposition for July 30, 2013, i.e. 8 days from today).

6. Wings’ understanding of the May 29, 2013 Order is different. Based on an exchange of emails (and Wings’ June 27th notice), Wings believes: (i) the proceedings are not suspended; (ii) that the Court intended to rule on the scope of Mr. Lizdas’ testimony before Wings’ testimony period began (which did not happen); and (iii) the deposition of Ben Lizdas should take place on July 30, 2013. (Ex. 2 – June 3, 2013 exchange of emails.)

Wings' understanding conflicts with the Court's Order, especially because there has been no ruling on "Wohali's Motion". Pursuant to the consented motion to reset trial periods (which was granted), Wings' testimony period began July 6, 2013 and ends August 5, 2013.

7. "Wohali's Motion" has been fully briefed.

8. On June 27, 2013, despite the Court's Order suspending all proceedings, Wings issued a Notice of Testimony Deposition for Ben Lizdas and Dan Hamilton, both depositions to take place on July 30, 2013. (Ex. 3.)

II. CONCLUSION/PRAYER

Wohali seeks clarification. Mr. Lizdas' deposition is set to take place in 8 days from today. Resetting the trial periods will provide the Court an opportunity to rule on "Wohali's Motion" before Wings' 30 day trial period begins. This is in the best interests of all Parties, as currently the Parties do not know the permissible scope of Mr. Lizdas' testimony. This would make preparing for the deposition extremely difficult, and resources would be wasted.

Because Wings' testimony period is near its end and there has been no ruling on "Wohali's Motion", Wohali moves the Court to:

(1) Clarify the May 29, 2013 Order (Ex. 1) to confirm that all proceedings (including trial depositions) are currently "suspended" (as indicated in the May 29, 2013 Order);

(2) Since Wings' testimony period is near its end, Wohali moves the Court to set new trial testimony periods, beginning with Wings' 30 day trial period; and

(3) Rule on this motion on an expedited basis.

Respectfully Submitted,

DOYLE HARRIS DAVIS & HAUGHEY

/s/ S. Max Harris

Steven M. Harris, OBA #3913

S. Max Harris, OBA #22166

Doyle Harris Davis & Haughey

1350 South Boulder, Suite 700

Tulsa, OK 74119

(918) 592-1276

(918) 592-4389 (fax)

Attorneys for Wohali

CERTIFICATE OF SERVICE

I do hereby certify that on the 22nd day of July, 2013, I caused a true and correct copy of the above and foregoing instrument to be sent to the following parties in the manner indicated below:

James D. Peterson
Jennifer L. Gregor
GODFREY & KAHN, S.C.
One East Main Street, Suite 500
Madison, Wisconsin 53701-2719

Email & Certified Mail: 7011 2970 0001 7871 6566

Pat Guest

Email only

JT Griffin

Email only

JT Brocksmith

Email only

/s/ S. Max Harris

UNITED STATES PATENT AND TRADEMARK OFFICE
Trademark Trial and Appeal Board
P.O. Box 1451
Alexandria, VA 22313-1451

Mailed: May 29, 2013

Cancellation No. 92054629

Sheltered Wings, Inc.

v.

Wohali Outdoors, LLC

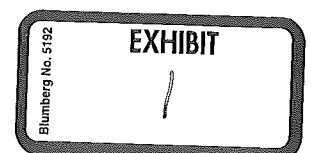
**George C. Pologeorgis,
Interlocutory Attorney:**

Petitioner's consented motion (filed May 17, 2013) to extend testimony periods is granted. Trademark Rule 2.127(a).

Testimony periods are reset in accordance with petitioner's consented motion.

In each instance, a copy of the transcript of testimony together with copies of documentary exhibits, must be served on the adverse party within thirty days after completion of the taking of testimony. Trademark Rule 2.125.

Briefs shall be filed in accordance with Trademark Rule 2.128(a) and (b). An oral hearing will be set only upon request filed as provided by Trademark Rule 2.129.



As a final matter, the Board notes that on May 17, 2013, respondent filed objections to petitioner's pretrial disclosures. Specifically, respondent objects to any testimony of petitioner's designated witness Ben Lizdas that exceeds the scope of his five-page declaration that was submitted in support of petitioner's opposition to respondent's motion for summary judgment.¹

The Board construes respondent's May 17, 2013 objections as a motion to limit the scope of testimony taken by petitioner during petitioner's assigned testimony period. The Board is construing respondent's objections as such in order to resolve any disputes regarding the testimony to be provided by Mr. Lizdas prior to the opening of petitioner's testimony period, as reset by this order.

Accordingly, proceedings herein are now suspended pending the disposition of respondent's construed motion to limit the testimony of Mr. Lizdas.

¹By order dated November 8, 2012, the Board denied respondent's motion for summary judgment, as well as petitioner's cross-motion for summary judgment.

Max Harris

From: "Gregor, Jennifer" <JGregor@gklaw.com>
Date: Monday, June 03, 2013 6:29 PM
To: "Max Harris" <max.harris@1926blaw.com>; "Peterson, James" <Jpeterso@gklaw.com>
Cc: "Lesley James" <lesley@1926blaw.com>; "Schwartz, Jacqueline" <JSchwartz@gklaw.com>
Attach: TTAB PLD 035 2013-05-29 Motion for Extension of Time GRANTED - Proceedin...pdf
Subject: RE: Wings v. Wohali - 1637-5 [GK-Active.FID985833]

Max,

My understanding of the Board's order is different—I understand from the Board's order (attached here) that the Board intends to try to resolve any dispute about Ben Lizdas' testimony before the reset testimony periods, so we should still plan on the stipulated dates. I note that the order itself states that "The Board is construing respondent's objections as [a motion] in order to resolve any disputes regarding the testimony to be provided by Mr. Lizdas prior to the opening of petitioner's testimony period, as rest by this order." Thus, we are still planning on proceeding with the testimony depositions of Dan Hamilton and Ben Lizdas on July 30. We will send a Notice of examination later this week. We will also expect Wohali's pretrial disclosures by August 20, 2013 according to our stipulation.

After my paralegal and I had filed the May 17 stipulation, I had noticed that we inadvertently filed the document in ESTTA as an 'opposed' motion, rather than as a stipulation or consented motion, so I called the Board to correct that filing issue. In any event, during my discussion with the interlocutory attorney about the filing issue with the stipulation, he mentioned he saw that Wohali filed an objection and that he would issue an order entering the stip and would include a note about Wohali's objection in the same order. The order appears to be consistent with what he said he would do. But if you think this needs further clarification, let me know.

On a related note, we indicated in our pretrial disclosures that we may want to take trial testimony from JT Griffin, and I proposed in a May 15 email that we stipulate to both parties taking his trial testimony on the same date so that he does not need to be deposed twice (once in our testimony period, and again in Wohali's). I note that you said that Wohali does not agree to forego its right to depose JT Griffin during its trial period. But can you let us know whether Wohali will be taking his testimony during Wohali's trial period? If so, we are open to a stipulation as I proposed for the deposition to take place during Wohali's testimony period—please let us know if this would be acceptable to Wohali and I can prepare a draft stip for your review. If this is not acceptable to Wohali, please let us know if you will agree to his deposition during the petitioner's testimony period via Notice of examination, or whether we will need to subpoena his testimony.

Please let me know if you have any questions.

Best regards,
Jen

Jennifer Gregor
Attorney

GODFREY & KAHN^{SC}
 One East Main Street, Suite 500
 Madison, Wisconsin 53703
 TEL • 608.257.3911
 DIR • 608.284.2629
 FAX • 608.257.0609
 EMAIL • jgregor@gklaw.com



7/22/2013

www • GKLAW.COM



Please consider the environment before printing this e-mail

From: Max Harris [mailto:max.harris@1926blaw.com]

Sent: Monday, June 03, 2013 4:17 PM

To: Gregor, Jennifer; Peterson, James

Cc: Lesley James

Subject: Wings v. Wohali - 1637-5

Counsel:

Regarding the Court's May 29, 2013 Order, the 1st half of the Order granted Wings' request to reset the trial periods. However, the 2nd half of the Order largely rendered the ruling moot as the Court then suspended all proceedings in the case (including Wohali's obligation to provide Pretrial Disclosures and all other trial deadlines), pending the disposition of Wohali's construed motion to limit the testimony of Ben Lizdas.

Please confirm this is your understanding as well.

- Max Harris

Best Regards,

S. Max Harris
Doyle Harris Davis & Haughey
1350 S Boulder, Suite 700
Tulsa OK 74119
(918) 592-1276
(918) 592-4389 (fax)
max.harris@1926bLaw.com
www.1926bLaw.com

7/22/2013

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

In re Registration No. 3,904,929

SHELTERED WINGS, INC.

Petitioner,

v.

WOHALI OUTDOORS, LLC

Respondent.

Cancellation No. 92054629

PETITIONER'S NOTICE OF TESTIMONY DEPOSITION OF BEN LIZDAS

To: Wohali Outdoors, LLC
Steven M. Harris (steve.harris@1926blaw.com)
S. Max Harris (max.harris@1926blaw.com)
DOYLE HARRIS DAVIS & HAUGHEY
1350 South Boulder, Suite 700
Tulsa, OK 74119

PLEASE TAKE NOTICE that in accordance with Federal Rules of Civil Procedure 28 and 30 and Trademark Rule 2.123(c), Petitioner, Sheltered Wings, Inc., through its attorneys will take the testimony deposition of Ben Lizdas, Sales Manager of Petitioner's Eagle Optics division. The deposition will take place on Tuesday, July 30, 2013 at 2:30 p.m., or after the conclusion of the deposition of Dan Hamilton, at the offices of Godfrey & Kahn, S.C., One East Main Street, Suite 500, Madison, Wisconsin 53703. The deposition will be taken by oral examination under oath before an officer authorized by law to administer oaths, and will continue from day to day until concluded. The deposition will be recorded by stenographic means.



Date: June 27, 2013

By: /Jennifer L. Gregor/

James D. Peterson
Jennifer L. Gregor
GODFREY & KAHN, S.C.
One East Main Street, Suite 500
Madison, Wisconsin 53701-2719
Tel.: (608) 257-3911
Fax: (608) 257-0609
Email: jpeterson@gklaw.com,
jgregor@gklaw.com

Attorneys for Petitioner, Sheltered Wings, Inc.

CERTIFICATE OF SERVICE

I hereby certify that a true and complete copy of the foregoing Notice of Testimony Deposition of Ben Lizdas was served by email and first class mail, postage prepaid, on June 27, 2013, upon the following:

Steven M. Harris (steve.harris@1926blaw.com)
S. Max Harris (max.harris@1926blaw.com)
DOYLE HARRIS DAVIS & HAUGHEY
1350 South Boulder, Suite 700
Tulsa, OK 74119

/Jennifer L. Gregor/
Jennifer L. Gregor

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

In re Registration No. 3,904,929

SHELTERED WINGS, INC.

Petitioner,

v.

WOHALI OUTDOORS, LLC

Respondent.

Cancellation No. 92054629

PETITIONER'S NOTICE OF TESTIMONY DEPOSITION OF DAN HAMILTON

To: Wohali Outdoors, LLC
Steven M. Harris (steve.harris@1926blaw.com)
S. Max Harris (max.harris@1926blaw.com)
DOYLE HARRIS DAVIS & HAUGHEY
1350 South Boulder, Suite 700
Tulsa, OK 74119

PLEASE TAKE NOTICE that in accordance with Federal Rules of Civil Procedure 28 and 30 and Trademark Rule 2.123(c), Petitioner, Sheltered Wings, Inc., through its attorneys will take the testimony deposition of Dan Hamilton, President and founder of Petitioner's Eagle Optics division. The deposition will take place on Tuesday, July 30, 2013 at 9:00 a.m. at the offices of Godfrey & Kahn, S.C., One East Main Street, Suite 500, Madison, Wisconsin 53703. The deposition will be taken by oral examination under oath before an officer authorized by law to administer oaths, and will continue from day to day until concluded. The deposition will be recorded by stenographic means.

Date: June 27, 2013

By: /Jennifer L. Gregor/
James D. Peterson
Jennifer L. Gregor
GODFREY & KAHN, S.C.
One East Main Street, Suite 500
Madison, Wisconsin 53701-2719
Tel.: (608) 257-3911
Fax: (608) 257-0609
Email: jpeterson@gklaw.com,
jgregor@gklaw.com

Attorneys for Petitioner, Sheltered Wings, Inc.

CERTIFICATE OF SERVICE

I hereby certify that a true and complete copy of the foregoing Notice of Testimony Deposition of Dan Hamilton was served by email and first class mail, postage prepaid, on June 27, 2013, upon the following:

Steven M. Harris (steve.harris@1926blaw.com)
S. Max Harris (max.harris@1926blaw.com)
DOYLE HARRIS DAVIS & HAUGHEY
1350 South Boulder, Suite 700
Tulsa, OK 74119

_____/Jennifer L. Gregor/
Jennifer L. Gregor